

JADARA

Volume 23 | Number 1

Article 5

September 2019

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Recommended Citation

McCrone, W. P., & Payette, B. A. (2019). A Statutory Remedy for Negligent Hiring in Deafness Rehabilitation. *JADARA*, 23(1). Retrieved from <https://repository.wcsu.edu/jadara/vol23/iss1/5>

A STATUTORY REMEDY FOR NEGLIGENT HIRING IN DEAFNESS REHABILITATION

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Abstract

Given the modest gains in hiring well qualified deafness rehabilitation personnel in Vocational Rehabilitation, is it time to recognize that negligent hiring in deafness rehabilitation is a subtle form of discrimination against deaf and multiply handicapped deaf VR applicants? Amendments to the Rehabilitation Act are recommended to remedy the negligent hiring practices of some VR agencies that further disable deaf clients by hiring rehabilitation personnel who lack the skills to work effectively with deaf and multiply handicapped people.

Senator Lowell Weicker (1984), the recently defeated champion of disabled people, once said that, "a wave of activism and accomplishment for handicapped people crested in the 1970's." His message to disabled people was that if we are not moving forward, we are moving backwards. Weicker's sentiments are similar to those of disability rights attorney, Jean Postelwaite (1980):

In order to make a real impact on the lives of the disabled, enforced legislation, community based advocacy and personal persuasion will prove most effective. In other words, the excitable push that began in the 1970's will have to turn to a sustained commitment in the 1980's if we are to avoid the reversal of rights that are at the very least paper victories and yet hold the promise for real progress. The landmark decisions are exciting headline-catchers, but as *Brown v. Board of Education* and *Wyatt v. Stickney* have shown us, they are not particularly effective tools for social change. The sustained, quiet persuasion of knowledgeable, concerned advocates

at the grass roots level, as well as strong government support and leadership will provide the quickest surest victories.

Grass Roots Efforts to Improve the Quality of VR Deafness Rehabilitation Workers

The *Model State Plan for the Vocational Rehabilitation of Deaf Clients* (Schein, 1980) was one of the great "grass roots" rehabilitation achievements of the 1970's. It was the cooperative effort of deaf leaders, state Vocational Rehabilitation administrators and academic advocates dedicated to improving VR services for deaf people. The document emphasized deaf consumer involvement with VR in assessing and meeting the rehabilitation needs of deaf and multiply handicapped people through a "State Advisory Committee on Deafness."

One chapter of the *Model State Plan* was devoted to deafness rehabilitation personnel goals that included the pivotal State Coordinator for Deafness (SCD), Rehabilitation Counselors for Deaf Clients (RCD) and others. In each instance, the *Model State Plan* articulated the functions and qualifications for the deafness rehabilitation workers who would make the VR system accessible for deaf people. The *Model State Plan* further emphasized that, "throughout the entire VR process, qualified persons must be recruited and hired," in casefinding, evaluation, adjustment training, vocational training, counseling, placement and follow-up (Schein, 1980). Ouellette and Austin (1980) made the quality and effectiveness of VR deafness rehabilitation personnel an essential feature of the external evaluation of VR programs for the deaf. Schein (1977) listed the quality of deafness rehabilitation personnel among the "top priorities in deafness," calling for (1) standards and certification for rehabilita-

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tion workers with deaf clients, (2) a survey of manpower needs in deafness rehabilitation and "steps to close the gap between needs and available manpower," and (3) the implementation of the **Model State Plan** by state VR agencies under the leadership of the Council of State Administrators of Vocational Rehabilitation (CSAVR). The Commission on Education of the Deaf (1988) recently stated:

We believe that the identification of the skills required of "qualified" personnel and the training of professionals to work with clients who are deaf should become a top Rehabilitation Services Administration (RSA) priority over the next several years. Many respondents noted instances where "unqualified" personnel have been employed to work with clients who are deaf. It is clear to us that such circumstances can only delay effective rehabilitation of deaf clients. On-the-job training is unacceptable. Clients cannot and should not wait for counselors to develop minimal skills needed for the job before their clients get the services to which they are entitled. Several respondents suggested the training for rehabilitation personnel be practical in nature, and include coursework that includes experience with multiply handicapped deaf persons, persons in rural areas, mental health counseling, audiology and hearing aid fitting, communication methods, deaf culture, and psychological and vocational assessment techniques.

In spite of the Rehabilitation Act Amendments of 1984 (P.L. 98-221) requirement that rehabilitation practitioners be qualified, and the Rehabilitation Act Amendments of 1978 (P.L. 95-602) mandate that rehabilitation personnel should be able to communicate in the client's communication mode, there are still some state VR agencies that further disable deaf VR applicants by hiring unqualified VR personnel to work with deaf people. The 1984 Rehabilitation Act Amendments (P.L. 98-221), Section 304(c) requires that the Rehabilitation Services Administration Commissioner prepare a yearly report about rehabilitation personnel shortages. These shortages are to be addressed through the investment of RSA training dollars. A study commissioned by RSA (Pelvan Associates, 1987) found that rehabilitation counseling was first in rehabilitation personnel shortages but rehabilitation coun-

seling with the deaf was the third greatest shortage when they looked at the way unfilled RCD positions affect VR client numbers. Danek (1987) found an "overwhelming" shortage of deafness rehabilitation personnel in a survey of 225 state VR and related rehabilitation agencies. Further, the Danek study stated that:

It appears obvious from the data obtained that to be qualified in deafness rehabilitation a professional must possess communication skills and other deafness-related competencies in addition to generic discipline-specific competencies. The most critical competencies, according to respondents to this survey, can only be obtained through pre-service, rather than a post-employment training program.

Further, in a soon to be published study, Szymanski & Parker (in press) found that master's degree rehabilitation counselors "achieved significantly better" outcomes with severely disabled clients than their counterparts with bachelor's and unrelated master's degrees. Inexplicably, the Rehabilitation Services Administration has now terminated funding for several respected master's programs in rehabilitation counseling with the deaf fully accredited by the Council on Rehabilitation Education (Woodrick, 1988). A study by Wilkins, DeLoach and Banks (1985) found that 29% of VR agencies hire entry level VR counselors with a bachelor's degree and no experience; and 56% require a bachelor's degree and some experience for entry level VR counselor jobs. How can this be reconciled with the fact that only about 2% of the successfully closed VR clients are deaf people (Rehabilitation Services Administration, 1988)?

It is always preferred that state VR agencies, deaf consumers and rehabilitation educators work together voluntarily to improve rehabilitation services for deaf and multiply handicapped deaf people. But the law, the VR agency and the VR budget are of little consequence if there are not well qualified deafness rehabilitation personnel in place to make the VR system work for deaf people. When voluntary cooperation does not work, or when it does not work fast enough, is it time to ask the Congress to amend the Rehabilitation Act to deal with VR agencies involved with negligent hiring practices in deafness rehabilitation?

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What is Negligent Hiring?

Can you imagine taking your injured child to a beautiful, well funded hospital emergency room where the kitchen staff provides medical care in a different language? How is this hospital negligence different from the actions of real rehabilitation counselors assigned to work with deaf people who sponsor hundreds of deaf VR clients to a local community college for associate's degree and certificate training over a seven year period but no client ever graduates? How is the emergency room analogy different from the true case of the deaf male VR client referred for personal counseling with a non-Signing, hearing psychologist as part of the individual written rehabilitation plan? The VR counselor hired an uncertified interpreter with very basic skills to work with the deaf client and hearing psychologist. In the process of therapy, the deaf client revealed his struggle with homosexuality and drugs. The unqualified interpreter went on to violate the confidentiality of the therapy by spreading stories in the community about the client's homosexuality and drug use. The client attempted suicide. What about the \$25 VR general medical exam that failed to pick up the rubella-related heart defect of a young deaf VR applicant who later had a heart attack during a vocational evaluation? Shouldn't VR medical consultants know something about Sign Language and the probability of heart problems among deaf VR clients in 1989? In spite of expanding employment opportunities in many states, why do so many rehabilitation counselors still place deaf VR clients in dead-end, unskilled jobs without proper evaluations and job training (Pitts, 1980)? When does negligent hiring in Vocational Rehabilitation further disable the hearing-impaired client? How many deaf and multiply handicapped deaf VR clients are closed as "unfeasible" because the state VR agency program for deaf clients needs rehabilitation?

All private employers and many public employers are liable for negligent hiring, or injuries inflicted on customers or clients by employees. As in all negligence suits, the injured customer or client has the burden of proving certain elements in order to establish a valid claim. The elements of a negligent hiring claim include the following (Gregory, 1988):

1. **Duty.** The duty is owed where two conditions obtain:
 - (a.) An employment relationship exists

between the defendant (employer) and the person causing the plaintiff's (client's) injuries, and

- (b.) A sufficient connection existed between the plaintiff (client) and the defendant's (employer's) business activities to impose a **duty of care**.

2. **Breach.** The duty is breached when:

- (a.) the employee is incompetent, and
- (b.) the employer had actual knowledge that the employee was incompetent, or
- (c.) the employer failed to investigate adequately the employee's background or to provide adequate training or to evaluate adequately the employee's job performance, when an incompetent employee created a well-known risk of harm.

3. **Cause in Fact.** The employer's negligence is a cause in fact of the plaintiff's (client's) injury when that injury was caused by the characteristic which rendered the employee incompetent.

4. **Proximate Cause.** The employer's negligence is the proximate cause of the plaintiff's (client's) injuries when:

- (a.) the injury was reasonably foreseeable in light of the information which an adequate personnel policy would have uncovered, or
- (b.) the failure to investigate itself created a specific type of risk, and the plaintiff's (client's) injury falls within that risk, or
- (c.) the plaintiff's (client's) injury was the direct outcome of the defendant's (employer's) negligence.

5. **Damages.** The plaintiff (client) was damaged (physical, mental, economic) by the employer's negligence.

State VR agencies are currently protected from most negligence lawsuits because of sovereign and official immunity (Winborne, 1982).

Recommended Amendments to the Rehabilitation Act to Eliminate Negligent Hiring in Deafness Rehabilitation

The following recommendations are offered as catalysts in a debate about remedies to negligent hiring in deafness rehabilitation. The recommendations are based on several premises. First, negligent hiring is a subtle but devastating form of discrimination against deaf people seeking quality Vocational Rehabilitation services.

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Second, some state Vocational Rehabilitation agencies have **excellent** reputations in recruiting very well trained deafness rehabilitation personnel. One measure of that excellence is the annual state data on the numbers and quality of VR placements with deaf and multiply handicapped deaf people. Third, legal remedies should be the last resort in solving deafness rehabilitation personnel problems. But, in terminating funding for respected rehabilitation counseling for the deaf training programs and hiring unqualified deafness rehabilitation workers, RSA and some state VR agencies will cause deaf people and their advocates to seek out legislative remedies where reason and good faith have failed. Racial and disabled minorities have often had to turn to legal remedies when professional ethics and cooperation fail to change discriminatory practices (Rothstein, 1984). Fourth, it is suggested that existing law and remedies in rehabilitation have proven to be insufficient to cure the problem of negligent hiring in deafness rehabilitation. For example, existing Client Assistance Programs and VR "due process" procedures have not brought sufficient pressure on VR to recruit better qualified deafness rehabilitation people. Due process means nothing to the naive, discouraged deaf VR applicant who turns away from VR because no one in the front office can communicate with her. Similarly, Section 1003 of the 1986 Amendments to the Rehabilitation Act (P.L. 99-506) prohibits state VR immunity when the state agency violates Section 504 and other civil rights laws, but there is no *specific* provision of the law that provides a remedy for negligent hiring in Vocational Rehabilitation.

The following amendments to the Rehabilitation Act are recommended to directly and indirectly remedy the problem of negligent hiring in deafness rehabilitation:

Recommendation 1. Eliminate state VR agency immunity in negligent hiring suits.

Recommendation 2. Provide federal VR funding incentives to state VR agencies that help implement State Commissions on Deafness (Schein, 1984) and the *Model State Plan for the Vocational Rehabilitation of Deaf Clients*, particularly the timely establishment of standards for competent deafness rehabilitation personnel throughout the VR process; special facilities for multiply handicapped deaf VR clients; effective interagency action plans (e.g., alcohol and drug abuse treatment, mental health services); and

"line authority" for the VR State Coordinators for the Deaf.

Recommendation 3. Establish a "weighted closure" system in Vocational Rehabilitation that recognizes the quality and appropriateness of the closure, not just the number of deaf VR clients placed in jobs (Vernon & Hyatt, 1981).

Recommendation 4. Establish a *Commission on the Rehabilitation of Deaf People* with funding, timelines and personnel similar to the Commission on the Education of the Deaf. One mandate of the Commission would be to further investigate the relationship between VR outcomes with deaf clients and the availability of qualified deafness rehabilitation personnel throughout the VR process.

Recommendation 5. Rescind the provision of the 1986 Rehabilitation Act Amendments (P.L. 99-506) that reduces the federal share of VR Basic State Grant costs from 80% to 75%. The federal share should be held at 80% and the \$1.4 billion VR Basic State Grant should be significantly increased so that state VR agencies can provide more VR services to deaf clients, and competitive salaries with bi-lingual pay incentives to deafness rehabilitation workers throughout the VR process who are competent in Sign Language (Caccamise, Newell, Fennell & Carr, 1988). In a national job market that is increasingly hospitable to non-traditional, entry level deaf workers (Bowe, 1984), \$1.4 billion is an inadequate investment in Vocational Rehabilitation, VR service providers and disabled people motivated to work. Bowe (1980) has argued that the federal government spends ten times as much on "dependency programs" for handicapped people as on programs to increase independence. Even with the federal budget deficit, it is difficult to reconcile the \$1.4 billion VR Basic State Grant with the expenditure of \$100 billion in taxpayer dollars to rescue the savings and loans (Moore, 1989), \$25 billion in federal farm income supports, and \$15 billion in foreign aid (Office of Management and Budget, 1987).

In conclusion, unless deaf consumers, RSA, state VR agencies and rehabilitation educators can begin to cooperatively eliminate negligent hiring in deafness rehabilitation soon, it may be necessary for the American Deafness and Rehabilitation Association (ADARA) and the National Association of the Deaf (NAD) to turn to legislative remedies. One takes some consolation in the words of the late NAD Executive Director,

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Fred Schreiber, who said in 1973 (Schein, 1981):

We face critical times today. At the moment it appears that we are headed back to the "Dark Ages" and that all the progress we have made in upgrading education and improving services for the deaf over the past decade are to be wiped out, —eloquent testimony that it takes years to build but only moments to destroy that which took those years to develop . . . The events of the past decade, and especially of the more

recent years, have thoroughly dispelled the notion that as a minor minority we are helpless pawns in the larger scheme of things. We have shown that with determination and cooperation we can change the course of event to take our needs and desires into consideration. We have proven that working together with people who have common interests, we can reach out and overcome the obstacles that face us today.

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